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ALEXANDER L. STEVAS,
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

WILLIAM H. JOINER, JR.,
Petitioner

v.

KAREN H. VASQUEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether the judgment of the Court of Appeals of Texas for the Fifth Supreme Judicial District is consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution in view of the fact that through its imposition of the doctrine of res judicata to bar petitioner's present bill of review proceeding it validates a default decree terminating Petitioner's parental rights which is demonstrably constitutionally invalid for want of adequate notice and the merits of the grounds for termination have never actually been adjudicated in an adversary proceeding in which petitioner has appeared.

LIST OF PARTIES

William H. Joiner, Jr. (Petitioner)

Karen H. Vasquez (Respondent)

Rebecca Leigh Joiner (Children of

and Petitioner

William Bartley Joiner and Respondent

parties in the

district court,

but not in the

court of appeals)

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The opinions of the Court of Appeals of Texas for the Fifth Supreme Judicial District and the dissenting opinions (beginning at P. App.[1] A1) are reported at 632 S.W. 2d 755 (Tex. App. - Dallas 1982).

JURISDICTION

The judgment of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A65) was entered on December 11, 1981. The petitioner's motion for rehearing was overruled by

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[1] "P. App." refers to the appendix to this petition.

order of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A67) on March 17, 1982. The petitioner's second amended motion for rehearing was overruled by order of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A69) April 30, 1982.

The petitioner's application for writ of error was refused as presenting notation no reversible error by order of the Supreme Court of Texas (P. App. A70) on January 29, 1983. The petitioner's motion for rehearing was overruled by order of the Supreme Court of Texas (P. App. A72) on March 9, 1983.

The jurisdiction of this Court is invoked under 28. U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved, U.S. Const. Amend. XIV, §1, provides in pertinent part:

> . . .nor shall any State deprive any person of life, liverty, or property, without due process of law. . .

STATEMENT OF CASE

On February 11, 1976, respondent, Petitioner's ex-wife, then known as Karen Stephens, filed an original petition in cause number 76-165-JUV in a juvenile court of Dallas County, Texas, to terminate petitioner's parental rights as to his children by her, Rebecca Leigh Joiner and William Bartley Joiner, (Court of appeals opinion, P. App. A2.) Personal service was attempted on petitioner and, thereafter, notice was undertaken through publication, and an attorney ad litem was appointed to represent petitioner. (Court of appeals opinion, P. App. A2.) On June 3, 1976, the juvenile court entered a default decree in cause number 76-165-JUV terminating petitioner's parental rights as to both children. (Court of appeals

opinion, P. App. A2-3) On February 24, 1977, petitioner filed a motion for bill of review in cause Number 77-161-JUV in the same juvenile court of Dallas County, Texas, which was presided over by a new judge, to set aside the decree of termination. (Court of appeals opinion, P. App. A3.) However, the juvenile court erroneously imposed on petitioner the traditional requirement of a bill of review proper that he establish a meritorious defense to the grounds for termination. (Court of appeals opinion, P. App. A 9. Dissenting opinion per Akin, J., P. App. A32. B.R.1-S.F.[2] 60-61).

Counsel for petitioner was, not unjustifiably, unprepared to present such a meritorius defense at that particular time. (B.R.1-S.F. 60-61.) As a result,

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[2]"B.R.1-S.F." refers to the statement of facts in cause number 77-161-JUV, petitioner's first bill of review proceeding.

on September 22, 1977, the juvenile court denied petitioner's motion for bill of review in cause number 77-161-JUV. (Court of appeals opinion, P. App. A4. B.R.1-SF 60-61).

• Counsel for petitioner failed to file an appeal from the denial of the motiton for bill of review in cause number 77-161-JUV. (Court of appeals opinion, P. App. A4.) Instead, on September 27, 1977, petitioner filed a second bill of review in cause number 77-855-W in a district court of Dallas County, Texas, to set aside the decree of termination. (Court of appeals opinion, P. App. A4.) On March 7, 1978, the district court denied petitioner's motion for bill of review in cause number 77-855-W upon respondent's plea of res judicata. (Court of appeals opinion, P. App. A4.) Once again counsel for petitioner failed to file an appeal from

the denial of the motion for bill of review in casue number 77-855-W. (Court of appeals opinion, P. App. A4.)

On January 3, 1980, petitioner having obtained new counsel, filed a third petition for bill of review in cause number 80-7-W in the District Court of Dallas County, Texas, for the 304th Judicial District to set aside the decree of termination. (Court of appeals opinion, P. App. A4.) On March 21, 1980, petitioner filed in cause number 80-7-W his first amended petition for bill of review (P. App. A73.) Petitioner alleged therein that the termination decree was void because the juvenile court lacked jurisdiction over him to render the decree since he had not received adequate notice of the termination proceeding against him as required by the due process clause of the Fourteenth Amendment to the United State

Constitution. (P. App. A76-84). On April 14, 1980, the district court denied petitioner's petititon for bill of review in cause number 80-7-W. (P. App. A97-98) upon respondent's plea of res judicata (P. App. A94-96). Petitioner filed a motion for rehearing (P. App. A99-100), which the district court denied on May 14, 1980 (P. App. A101.)

Petitoner appealed to the Court of Appeals of Texas for the Fifth Supreme Judicial District. Petitioner specifically argued on appeal that the termination decree was void because the juvenile court lacked jurisdiction over him to rencer the decree since he had not received adequate notice of the termination proceeding against him as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Brief for Appellant, P. App. A102-18.)

The court of appeals sidestepped this contention and affirmed the judgmentof of the district court in cause number 80-7-W on the ground that:

> [T]he plea of res judicata was properly sustained because the judgment denying the first bill of review is conclusive on the issue of the court's jurisdiction in the termination suit. The first bill of review was a direct attack; and might properly have been considered as a motion new trial within rule 329, to which the strict requirements of a bill of review did not apply, because citation was served by publication and the bill of review was filed within two years. Nevertheless, a direct attack was made, the jurisdiction of the juvenile court in the termination proceeding was put in issue, relief was denied, and Joiner did not appeal. That judgment bars the present bill of review under the well-settled rule that a party is bound by a adjudication of the court's jurisdiction in a contested proceeding.
>
> . . . .
>
> Under these well-established rules, even though the original termination decree may be void - or more properly, voidable - in the sense that it was rendered without valid service of process, the judgment in the first bill of review is valid and stands as a bar to the present bill of review.
> . . .[Joiner's] right to attack the termination decree died with his

failure to appeal from the denial of his first bill of review.

(Court of appeals opinion, P. App. 9-11 (citations omitted).)

The court of appeals concluded that imposition of the doctrine of res judicata to bar petitioner's present bill of review was justified by the public policy that "there must be an end to litigation" and that the disturbing influence of multiple lawsuits upon the environment of young children must be discouraged. (Court of appeals opinion, P. App. A 10, 13-15) on December 11, 1981, the court of appeals rendered judgment affirming the judgment of the district court in cause number 80-7-W. (P. App. A65.)

On rehearing petitioner specifically argued: "Texas public policy does not override the Fourteenth Amendment of the United States Consitution. This reasoning is particularly compelling in this case because it cannot be doubted

that the integrity of the family unit has found protection the the Due Process Clause of the Fourteenth Amendment." (Appellant's Motion for rehearing P. App. A119-22 (citation omitted).) On March 17, 1982, the court of appeals overruled petitioner's motion for rehearing. (P. App. A67-68.) On further rehearing petitioner specifically advanced the same argument once again. (Appellant's second amended motion for rehearing, P. App. A123-27.) On April 30, 1982, the court of appeals overruled petitioner's second amended motion for rehearing (P. App. A69.) Petitioner then applied for writ of error to the Texas Supreme Court. In his application for writ of error petitioner again specifically attacked the judgments of the court of appeals on the ground that: "Texas public policy does not override the Fourteenth Amendment of the United States Constitution. This reasoning

is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment." (Petitioner's application for writ of error, P. App. A128-32.) On January 29, 1983, the Supreme Court refused petitioner's application for writ of error as presenting no reversible error. (P. App. A70-71.) On March 9, 1983, the supreme court overruled petitioner's motion for rehearing. (P. App. A72.)

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals of Texas for the Fifth Supreme Judicial District has effectively decided a highly significant question of federal constitutional law that has not been, but should be, settled by this Court.

The termination of petitioner's parental rights involved the termination of an interest in liberty deemed fundamental under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This Court has recently reiterated "this Court's historical recognition tht freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

Petitioner was entitled under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him. In a prior case involving termination of parental rights this Court held:

> It is clear that failure to give petitioner notice of the pending adoption [and corresponding termination] proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceeded by notice and opportunity for hearing appropriate to the nature of the case.' 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (quoting Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-14 (1950)) (citations in both opinions omitted).

Petitioner was further entitled under the Due Process Clause of the Fourteenth Amendment to be heard on the merits in the termination proceeding. As this Court has clearly held innumerable times: "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). In a more recent case, invowing termination of parental rights, this Court held:

> The State's interest in caring for Stanley's children [effectuated by terminating his parental rights] is de minimus if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). There is no real distinction in this regard between cases involving

termination of parental rights through action of state agencies and those involving termination through action of private litigants, as in the case at bar. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Petitoner has alleged in his present petition for bill of review (P. App. A76-84), and the record will fully substantiate upon remand for trial, that he was denied his basic right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him in that:

Petitioner was a nonresident of Texas at the time the termination proceeding was instituted against him. Personal service of citation upon him was attempted (pursuant to Tex. R. Civ. P. 108) by forwarding citation to the Sheriff of Oklahoma County, Oklahoma, who

was to execute service. The sheriff's return of the unexecuted citation indicates only that he was unable to contact petitioner and did not indicate (as required under Tex. R. Civ. P. 107 (Vernon 1967)) the diligence, if any, exercised by the sheriff in attempting to execute service.

As a result, petitioner was improperly cited to appear in the termination proceeding solely by means of publication (under Tex. Fam. Code Ann. §11.09(d) (Vernon Supp. 1982-83)). Not surprisingly, petitioner consequently received no notice whatsoever of the termination proceeding. This was compounded by the failure of the judge of the juvenile court in the termination proceeding to comply with her duty (under Tex. R. Civ. P. 109) to inquire into the sufficiency of the diligence exercised in attempting nonresident personal service

on petitioner. This was further compounded by the failure of the guardian ad litem appointed by the court to represent petitioner to challenge the sufficiency of the procedure employed to attempt nonresident service of citation upon petitioner.

Further, respondent knew the whereabouts of petitioner's parents and sister. It follows that substitute service on any of them (under Tex. R. Civ. P. 109a) rather than citation by publication, was the method reasonably calculated under the circumstances to apprise petitioner of the termination proceeding against him. Petitioner's receipt of no notice of that proceeding was compounded by the failure of the guardian ad litem appointed to represent him to: (1) cross examine respondent as to her efforts to locate petitioner and (2) locate petitioner himself when he

could have done so easily by contacting petitioner's parents or sister.

The facts fully establish that petitioner was denied his minimum right under the Due Process Clause of the Fourteenth Amendment to receive "notice reasonably calculated, under all the circumstances," to apprise him of the termination proceeding against him, as mandated by this court in Armstrong v. Manzo, 380 U.S. 545, 550 (1965), and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-14 (1950). Further, this court has clearly indicated that persons, such as petitioner, faced with the termination of their fundamental parental rights are entitled to an even higher standard of protection under the Due Process Clause:

> Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights

> have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

In essence petitioner has alleged in his present petition for bill of review, and the record will fully substantiate upon remand for trial, that the denial of his right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him effectively resulted in the denial of his right under the Due Process Clause to be heard on the merits in the termination proceeding. Specifically, petitioner has alleged in his present petition for bill of review (P. App. A87-89), and the record will fully substantiate upon remand for trial, that the guardian ad litem who was appointed by the court to represent petitioner in the termination proceeding - as a result

of his failure to appear due to his having received no notice of the proceeding - wholly failed to represent petitioner effectively in that: (1) He failed to file an answer on behalf of petitioner.

(2) He failed to cross-examine respondent as to her allegations for terminating petitioner's parental rights.

(3) He failed to request the filing of a statement of evidence prior to entry of the decree of termination (required under Tex. R. Civ. P. 244, 812).

(4) He failed to object to rendition of a default judgment (defined under Tex. R. Civ. P. 239 as a judgment rendered in the absense of an answer - the mere appearance of a guardian ad litem is not an answer, Brown v. Brown, 521 S.W.2d 730 (Tex. Civ. App. - Houston [14th Dist.] 1975, no writ)) against petitioner

(prohibited by Tex. R. Civ. P. 812 when nonresidents are cited by publications).

(5) He failed to object to rendition of the decree of termination to the extent that it was predicated on the ground of failure to provide child support for William Bartley Joiner in view of the fact that the judge of the juvenile court had previously advised counsel that she would not terminate petitioner's parental rights on that ground.

(6) He failed to object to rendition of the decree of termination to the extent that it was predicated on the ground that petitioner had placed William Bartley Joiner in conditions endangering him, in support of which ground no evidence was introduced.

Since petitioner was not notified of the termination proceeding against him, he was deprived of his right to present the facts refuting respondent's grounds

for termination, which facts he is fully capable of proving. He was also deprived of his right to present any defense to those grounds which he might have.

These facts fully establish that because petitioner was denied his right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him he was also effectively denied his right under the Due Process Clause to be heard on the merits in the termination proceeding, in contravention of the mandates of Stanley v. Illinois, 405 U.S. 645, 657-58 (1972), Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and Grannis v. Ordean, 234 U.S. 385, 394 (1914). The appointment of the guardian ad litem to represent petitioner in the termination proceeding against him was no substitute for adequate notice of the proceeding. Even petitioner's appearance pro se in

the proceeding would have been better than the appointment of the guardian ad litem; at least in that event petitioner could have made some defense on the merits. Thus, this Court's holding in Lassiter v. Department of Social Services, 452 U.S. 18 (1981) - that an indigent defendant in an action to terminate parental rights is not necessarily entitled to appointed counsel - has no application in the case at bar. Simply put, the effective denial of petitioner's right to be heard on the merits in the termination proceeding, resulting from the denial of his right to adequate notice of that proceeding, wholly fails to comport with the heightened standards of due process held by this Court to be accorded parents threatened with termination of their fundamental parental rights:

> Even when blood relationships are strained, parents retain a vital

> interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

The failure of petitone 's first attack on the decree of termination was the result of inextricably intertwined procedural errors on the part of the juvenile court and petitioner's prior counsel. It is beyond dispute that the juvenile court in petitioner's first bill of review proceeding should have treated the motion for bill of review as a motion for new trial under rule 329 of the Texas Rules of Civil Procedure. Brown v. Breneman, 385 S.W.2d 461 (Tex. Civ. App. - Dallas 1964, no writ). That rule, as it was in force at the time, provided in pertinent part:

> In cases in which judgment has been rendered on service of process

> by publication, where the defendant has not appeared in person or by attorney of his own selection:
>
> (a) The court may grant a new trial upon petition of the defenant showing good cause, supported by affidavit, filed within two years after such judgment was rendered . . . .

Tex. R. Civ. P. 329 (Vernon 1977). There is also no dispute that the court should have granted petitioner's motion under this standard.

Instead of corectly following Brown v. Breneman, the juvenile court erroneously treated petitioner's motion as one for a bill of review proper and correspondingly imposed on petitioner the requirement (set forth in Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950)) that he establish a meritorius defense to the grounds for termination before the decree of termination could be set aside. (B.R.1-S.F. 60-61.) Furthermore, the court ignored the holding in Gunn v. Cavanaugh, 391 S.W.2d 723 (1965), that when a petition is in

the nature of a bill of review as to a judgment terminating parental rights, the burden of proof on the merits of the grounds for termination rests not on the petitioner, but on the opposing party. Accord Leithold v. Plass, 488 S.W.2d 159 (Tex. Civ. App. - Houston [14th Dist.] 1972, no writ). Of far more significance, however, the juvenile court also ignored this Court's holding in Armstrong v. Manzo, 380 U.S. 545 (1965), that the Due Process Clause of the Fourteenth Amendment renders unnecessary the establishment of a meritorius defense to grounds of termination of parental rights in an attack in a Texas court on the termination decree of a Texas court when the parent whose rights were terminated did not have notice of the termination proceeding. As a result of these procedural errors, the juvenile court denied petitioner's first motion

for bill of review, since counsel for petitioner was, not unjiustifiably, unprepared to present a meritorius defense to the grounds for termination at that particular time. (B.R. 1-S.F. 60-61.*) This error was, in turn, compounded by the procedural errors of petitioner's counsel in: (1) not calling the juvenile court's errors to its attention and (2) not filing an appeal from the court's clearly erroneous judgment.

The inextricably intertwined procedural errors on the part of the juvenile court and prior counsel for petitioner leading to the final judgment denying petitioner's first motion for bill of review thus perpetuated the denial of petitioner's rights under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding and to a hearing on the merits of the grounds for

termination. The juvenile court's denial of relief to petitioner is even more outageous in view of the court's finding that respondent had perpetrated a fraud on the court in the termination proceeding (B.R.1 - S.F. 61) and that the record in the termination proceeding was "probably the worst record of any termination case [the court] had ever heard" (B.R.1 - S.F. 59).

The district court's denial of petitioner's second motion for bill of review upon respondent's plea of res judicata likewise served to perpetuate the denial of petitioner's rights under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding and to a hearing on the merits of the grounds for termination.

It is to be emphasized that through gross disregard by the courts for

petitioner's contitutional right to due process of law and through inextricably intertwined procedural errors on the part of the juvenile court and prior counsel for petitioner, the merits of the grounds for termination of petitioner's parental rights have yet to be actually adjudicated in a true adversary proceeding - as opposed to the farce purporting to be a trial in the termination proceeding. Further, the merits of petitioner's claim that his right to due process has been violated have yet to be actually adjudicated other than through preclusion under the doctrine of res judicata.

Whether the judgment of the court of appeals in the instant case barring under the doctrine of res judicata petitioner's collateral attack on the decree terminating his parental rights is violative of petitioner's right to due process of law under the Fourteehth

Amendment, in view of the foregoing facts, turns on a balancing of "three distinct factors" identified in Matthews v. Eldridge, 424 U.S. 319, 335 (1976): (1) the private interest affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Santosky v. Kramer, 455 U.S. 745, 754 (1982) (citing Lassiter v. Department of Social Services, 452 U.S. 18, 27-31 (1981)).

As to the first of these "three distinct factors" indentified in Eldridge, there can be no dispute: "In parental rights termination proceedings, the private interest affected is commanding . . . ." Santosky v. Kramer, 455 U.S. 745, 758 (1982).

As to the second "Eldridge" factor, the risk of error created by imposition

of the prodedural rule of res judicata in cases such as this is, to use the language of Santosky, "substantial." This is so because the truth of respondent's allegations in support of the decree of termination has yet to be adequately tested in a true adversary proceeding in this matter. The record in the farce that purported to be a trial in the termination proceeding contains no evidence as to at least some of those allegations; as to any others, petitioner can produce refuting evidence or present defenses. In spite of this, petitioner has suffered terminatin of his "commanding" parental rights as a result of events with respect to which it would be absurd and highly inequitable to hold him responsible: lack of notice adequate to apprise him of the termination proceeding and a combination of inextricably intertwined procedural

errors on the part of the juvenile court and prior counsel for petitioner. Undisputibly in this the justice system has so far failed to recognize petitioner's highly "critical need for procedural protections." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

The third "Eldridge" factor involved in the case at bar is the countervailing governmental interest supporting imposition of the doctrine of resjudicata. The same court of appeals that has decided the case at bar analyzed in detail the policy considerations underlying the doctrine of res judicata in Gilbert v. Fireside Enterprises, 611 S.W.2d 869, 877-80 (Tex. Civ. App. - Dallas 1980, no writ). In Gilbert the court noted that four policy considerations have been traditionally advanced as underlying the doctrine of res judicata: promotion of judicial

economy, prevention of vexatious litigation, prevention of double recovery and promotion of the stability of decisions. Id. at 877. In this connection, the court quoted with approval, id., the following statement by Professor Cleary:

> Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government. If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges. The fact that a party may waive the defense of res judicata, as seems to be the general rule, indicates that saving the judge's time is more afterthought than reason.

Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 348-49 (1948). Thus, promotion of judicial economy is not a sufficiently compelling state interest to warrant imposition of the doctrine of res judicata in the case at bar to cut off

petitioner's "commanding" individual interest in view of the risk of error involved.

As to prevention of "vexatious litigation" - which the court in Gilbert defined as litigation in which a plaintiff attempts to make two lawsuits do the work of one without attempting a double recovery or threatening the stability of a decision, 611 S.W.2d at 877 (citing Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 346, (1948) - the court in Gilbert concluded: "Application of the doctrine [of res judicata] solely for this reason would be too harsh a penalty under the cicumstances; prevention of vexation litigation, as we have defined the term, is simply not a sufficiently compelling consideration to warrant precluding [a] cause of action under res judicata." 611 S.W.2d at 878. In this connection the

court quoted with approval, id. at 877-78, the following observation by Professor Cleary:

> [T]he purpose of liberality in joinder rules is the same as the anti-vexatious-limitation purpose of the rule of res judicata, i.e., to encourage litigants to reduce the numerical volume of lawsuits by bringing more disputed matters into the same action. Yet when plaintiff seeks to make two lawsuits do the work of one [without attempting a double recovery or threatening the stability of a decision], the rule of res judicata applies to harsh a penalty (complete loss of plaintiff's right of recovery . . . .

Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 346-47 (1948). In fact, there is a strong policy favoring the vindication of substantive rights over strict enforcement of procedural rules designed merely to expedite lititation. Schopflocher, What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 Ore. L. Rev. 319, 321 (1942). As one court has poignantly noted: "All procedure is merely a

methodical means whereby the court reaches out to restore rights and remdy wrongs; it must never become more important than the purpose which it seeks to accomplish." Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79, 82 (1926). Thus, the prevention of vexatious litigation, as herein defined, is not a sufficiently compelling state interest to warrant imposition of the doctrine of res judicata in the case at bar to cut off petitioner's "commanding" individual interest in view of the risk of error involved.

The court in Gilbert concluded that "the truly legitimate policy considerations underlying the doctrine of res judicata are, in most cases, at least, prevention of double recovery and promotion of stability of decisions." 611 S.W.2d at 878. Because of the subject

matter of the case at bar and because petitioner has consistently been the judgment loser throughout the course of the proceedings under consideration, there is no danger of double recovery in the case at bar. Thus, there remains only the question whether Texas' interest in promoting the stability of the decision or decisions asserted as barring petitioner's present bill of review proceeding is sufficiently compelling to cut off petitioner's "commanding" individual interest in view of the risk of error involved.

Citing Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963), and Knowles v. Grimes, 437 S.W.2d 816 (Tex. 1969), the author of the court of appeals opinions in the case at bar, Chief Justice Guittard, argued that the "principle of finality of judgments" - i.e., the policy favoring stability of decisions - applies in cases involving termination of

parental rights "with a special force." (Court of appeals opinion, P. App. A14.) In support of this contention, he quoted (court of appeals opinion, P. App. A15.) the former's holding:

> As a matter of public policy there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of constant re-litigation should be discouraged. Once a final decree of custody is rendered, a subsequent suit to modify or to avoid the judgment should be res judicata of all causes of action which, with diligence, could have been asserted in the suit as a basis for obtaining custody and possession of the child.

Ogletree v. Crates, 363 S.W.2d at 436 (emphasis added). Accord Knowles v. Grimes, 437 S.W.2d at 817.

However, Chief Justice Guittard's policy analysis in the case at bar is fatally defective. Both Ogletree and Knowles involved not the complete termination of the parental relationship, as in the case at bar, but merely the

determination of child custody rights. In Ogletree the proceedings terminated by the judgments asserted as bars to further litigation had involved full evidentiary hearings on merits as to the conditions affecting the best interests of the child then existing. In Knowles there is no suggestion that the proceeding terminated by the judgment asserted as a bar to further litigation had not involved a full evidentiary hearing on the merits as to the conditions affecting the best interests of the child then existing. In Ogletree the decrees of custody accorded res judicata effect were not taken by defalut. In Knowles there is no suggestion that the decree of custody accorded res judicata effect was taken by default. In neither case was there any allegation that the decree or decrees of custody given res judicata effect were constitutionally invalid for want of adequate notice or otherwise.

Thus, Ogletree and Knowles are clearly and convincingly distinguishable from the case at bar, in which: (1) the judgment (in petitioner's first bill of review proceeding, or for that matter the judgment in his second bill of review proceeding) asserted as a bar terminated a proceeding in which there was no full evidentiary hearing on the merits as to the best interests of the children, (2) the decree of termination given res judicata effect (albeit indirectly in that it has been perpetuated by the judgments in petitioner's first two bill of review proceedings) was rendered against petitioner in default, (3) there are substantial allegations that the termination decree given (indirectly) res judicata effect is constitutionally invalid for want of adequate notice and (4) as noted, the complete terminaiton of the parental relationship, as opposed to

the mere determination of child custody rights, is involved.

Accordingly, since Ogletree and Knowles are not "directly in point" with the case at bar - and in fact far from it - they do not reflect a binding determination of Texas policy or state interest applicable in the case at bar, as is clear from the rule in Westinghouse Credit Corp. v. Kownslar, 496 S.W.2d 431, 532 & n.1 (Tex. 1973) - a case Chief Justice Guittard neglected to consider. In fact, another case which Chief Justice Guittard neglected to consider, although it is cited in Knowles, suggests that existing Texas policy is quite different in cases of the type as the one at bar from that enunciated in Ogletree and Knowles. In Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963), decided on the same day as Ogletree the Texas Supreme Court, while recognizing that "the law favors a

high degree of stability in a young child's home and surroundings," significantly professed "a logical belief that the ties of the natural relationship of parent and child ordinarily furnish strong assurance of genuine efforts . . . to provide the child with the best care and opportunities possible, and, as well, the best atmosphere for the mental, moral and emotional development of the child." Id. at 221 omitted language refers to the particular application of this proposition in child custody cases). The effect of a termination decree, as opposed to that of a custody decree, also lends overwhelming force to the argument that Chief Justice Guittard has accorded infinitely more weight in the case at bar to the State's interest in promoting the stability of decisions than it deserves. Subject to any limitations expressed in a custody decree, a possessory conservator

(i.e., a parent not having primary custody of a child) has a number of rights, privileges and duties with respect to his child. Tex. Fam. Code Ann. §14.03 (Vernon 1975 and Supp. 1982-83), §1404 (Vernon Supp. 1982-83). By comparison: "A decree terminating the parent-child relation-ship divests the parent and the child of all legal rights, privileges, duties, and powers, with respect to each other, except that the child retains the right to inherit from and through its divested parent unless the court otherwise provides." Tex. Fam. Code Ann §15.07 (Vernon Supp. 1982-83).

It is therefore highly questionable whether the petitioner has standing to reestablish his parental relationship with his children if the termination decree is allowed to stand. See Tex. Fam. Code Ann. §11.03 (Vernon 1975). By comparison, a custody decree may be

modified. Tex Fam. Code Ann. §14.08 (Supp. 1982-83). In other words, if the doctrine of res judicata is permitted in this case to validate an otherwise constitutinally invalid judgment, petitioner is likely to be left without any remedy. Ogletree and Knowles are thus clearly distinguishable from the case at bar.

The children are also likely to be left without any remedy from irreparable harm, even though they have an even more meritorious case (if it is possible to image one) than petitioner since they were not parties in the first two bill of review proceedings. (See court of appeals opinion, P. App. A18.) Although the court of appeals purported in its opinion not to bind the children by its holding, since they did not appeal in the case at bar (court of appeals opinion, P. App. A18-19), there is

nothing to prevent that court from subsequently applying to defeat a future attempt by them to set aside the termination decree the rule advanced by it that a subsequent judgment not on the merits of the grounds of termination (i.e., the judgment in the present bill of review proceeding, in which the children were parties) validates and gives effect to a constitutionally invalid termina-tion decree. (See dissenting opinion per Akin, J., P. App. A54). Further, must the children suffer the termination of their relationship with their father for an indeterminate number of additional years before the courts sort out their claim - even if they ultimately prevail? And what guarantee is there that the guardian ad litem - even if permitted by the court from which his authority is derived and which has thrice invoked technical rules

to effectively deny these children relief from a judgment supported by a record the court itself has characterized as "probably the worst record of any termination case [the court] had ever seen" (B.R.1 -S.F. 59) - will on his own initiative seek relief for the children? Thus, the case at bar falls squarely within the admonition of Justice Akin - the author of Gilbert and a dissenter in the case at bar - in another case which Chief Justice Guittard neglected to consider, although he had joined in it:

> [T]he court's duty to protect the children's interest should not be limited by technical rules. Pertinent facts which may directly affect the interests of the children should be heard and considered by the trial court regardless of the lack of diligence of the parties in their presentation of information to the court.

C- v. C-., 534 S.W.2d 359(Tex. Civ. App. - Dallas 1976, no writ) (citations omitted).

Given the "commanding interest" of the children and the "substantial" risk of error and irreparable harm to them in permitting the default decree of termination in the case at bar to stand, Texas' purported interest in applying the doctrine of res judicata to render that decree final to effectuate the children's best interests is a patent absurdity. Simply put, measured against the first two "Eldridge" factors, considered from the children's viewpoint, Texas' interest in applying the doctrine of res judicata is not even remotely compelling. Thus, it cannot be considered sufficiently compelling to warrant preclusion of petitioner's present bill of review proceeding.

By ignoring it, the Court of appeals in the case at bar has effectively decided a highly significant question of federal constitutional law:

> Whether a Court, through imposition of the doctrine of res judicata, may, consistent with the Due Process Clause of the Fourteenth Amendment, validate a default decree terminating parental rights which is demonstrably constitutionally invalid for want of adequate notice when the merits of the grounds of termination have never been actually adjudicated in a true adversary proceeding.

Petitioner submits that the answer to this question is, contrary to the opinion of the court of appeals, a resounding "no" under an "Eldridge" analysis. This court should grant writ of certiorari in the case at bar, reverse the judgments below, permit petitioner to establish the merits of his constitutional and paternal claims, and put an end to what Justice Akin has accurately characterized as "an appalling miscarriage of justice."[3] (Dis-

senting Opinion per Akin, J., P. App. A33.)

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[3]It would be absurd, in view of the minimal interest of the state in imposing the doctrine of res judicata in the case at bar, measured against the other two "Eldridge" factors, to deny the writ on the ground that the judgment imposing doctrine in petitioner's second bill of review proceeding precludes this suit.

B. The Court of Appeals of Texas for the Fifth Supreme Judicial District has effectively decided a question of federal constitutional law in a way that conflicts with a decision of this Court.

In acting as petitioner has suggested this Court would not be adopting any revolutionary principle of law because

the decision of the court of appeals in the case at bar conflicts with this Court's decision in Armstrong v. Manzo, 380 U.S. 455 (1965). In Armstrong the petitioner suffered a default decree by a Texas Court terminating his parental rights concurrent with the adoption of his child by his ex-wife's second husband. The petitioner had been given no notice of the proceeding, even though

the respondents knew of his whereabouts. Subsequently he brought suit (presumably a bill of review proceeding) in a second Texas court to have the decree set aside. The court granted him an evidentiary hearing, without setting aside the decree, in which he attempted to refute the grounds for termination. However, the court denied the petitioner the relief sought; its judgment was affirmed by the court of civil appeals and the Texas Supreme Court refused his application for writ of error.

On review by writ of certiorari, this Court unanimously held that the failure to give the petitioner notice deprived him of due process of law and that the subsequent evidentiary hearing did not cure the constitutionally invalid termination-adoption decree. 380 U.S. 550-51. Since the court of appeals in the case at bar held that the judgment in

petitioner's first bill of review proceeding bars his present attack on the demonstrably invalid termination decree under consideration, that court has in effect held that the judgment in the first bill of review proceeding cured any constitutional invalidity in the termination decree. (Court of appeals opinion, P. App. A9-12 .) Thus, the decision of the court of appeals in the case at bar conflicts with the decision of this Court in Armstrong.

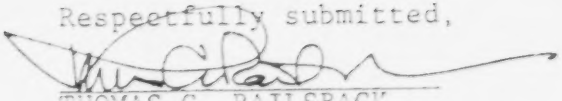
Although Armstrong and the case at bar are factually dissimilar in some respects, the facts in these two cases are strikingly similar. And although it is arguable that Armstrong can be distinguished from the case at bar on the theory that the former involved but one direct attack, while this case involves a collateral attack following a failed direct attack, this is a distinction

without difference. The case at bar and Armstrong are indistinguishable in terms of the basic principle at law involved. If anything, the case of bar calls even more strongly for reversal than Armstrong because in the case at bar the merits of the grounds for termination have never been actually adjudicated in a true adversary proceeding. Thus, the decision of the court of appeals in the case at bar is in conflict with that of this Court in Armstrong, and this Court should therefore grant writ of certiorari.

CONCLUSION

For the foregoing reasons petitioner requests that the petition for writ of certiorari be granted.

Respectfully submitted,



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